IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1795

ANHEUSER-BUSCH, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, and THE INTERSTATE COMMERCE COMMISSION, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ARTHUR L. WINN, JR.
SAMUEL H. MOERMAN
PAUL M. DONOVAN
743 Investment Building
Washington, D. C. 20005
(202) 628-2788

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

ANHEUSER-BUSCH, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, and THE INTERSTATE COMMERCE COMMISSION, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Anheuser-Busch, Inc., petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit entered February 24, 1977 in *The Atchison, Topeka and Santa Fe Railway Company et al.* v. *The United States of America, and The Interstate Commerce Commission,* No. 76-1198.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 549 F.2d 1186. The opinion appears in the Appendix hereto.* The order of the Interstate Commerce Commission and the related report of the Administrative Law Judge are not officially printed; and appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered February 24, 1977. The Court denied petitioners' petition for rehearing on March 31, 1977. This Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Upon complaint of the Board of Trade of the City of Chicago, the Interstate Commerce Commission ordered the railroads transporting wheat and wheat products, in carloads, from Chicago, Ill., to points in the eastern United States, to cease maintaining proportional or reshipping rates on ex-rail, ex-lake, and ex-barge movements of such commodities without maintaining similar proportional or reshipping rates where the movement to Chicago is by for hire motor carrier.

The Commission's order was based on Section 2 of the Interstate Commerce Act which prohibits unjust discrimination in the assessment of railroad rates. (49 U.S.C. Sec. 2)

Following hearing upon the complaint, the Commission by order (without issuing a report) adopted the Initial Decision of the Administrative Law Judge con-

---

[1] The Appendix to this petition is a separate volume.

taining his conclusion that the denial of the lower proportional or reshipping rates on ex-truck grain was unlawful under Section 2 of the Interstate Commerce Act.

The questions presented are:

1. Is the order of the Commission contrary to the decision of this Court in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943), where it was held that eastbound from Chicago proportional or reshipping railroad rates on ex-rail and ex-lake grain lower than on ex-barge grain was not violative of Section 2 of the Interstate Commerce Act despite the similarity of the railroad service provided eastbound from Chicago?

2. Did the decision of this Court in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947) overrule the Court's decision in *Inland Waterways, supra*?

3. Does Section 2 of the Interstate Commerce Act forbid denial of lower proportional or reshipping rates on ex-truck grain when the railroads do not maintain through routes with the truck carriers while such rates are made available under through-route arrangements on ex-rail, ex-lake and ex-barge grain traffic?[2]

---

[2] The questions presented by this petition are in general the same as those presented by petition for certiorari in No. 76-1721, *The Atchison, Topeka and Santa Fe Railway Company, et al.* v. *The Interstate Commerce Commission and The United States of America*, dated June 3, 1977.

STATUTORY PROVISION INVOLVED

The statutory provision involved is Section 2 of the Interstate Commerce Act (49 U.S.C. Sec. 2), which reads:

> "That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

STATEMENT OF THE CASE

The Proceedings Below

This proceeding was instituted by complaint of the Board of Trade of the City of Chicago filed with the Interstate Commerce Commission alleging that the proportional or reshipping railroad rates in the shipment of wheat and wheat products, in carloads, from Chicago, Ill. to destinations in the eastern parts of the United States were, among other things, unjustly discriminatory in violation of Section 2 of the Interstate Commerce Act. (49 U.S.C. Sec. 2)

Following hearing, a Commission Administrative Law Judge issued an Initial Decision (App. p. d-1) finding and concluding that the denial of the same pro-

portional or reshipping rates on ex-truck grain as are maintained eastbound from Chicago on ex-rail, ex-lake and ex-barge grain violated Section 2 of the Interstate Commerce Act. (49 U.S.C. Sec. 2)

By order dated January 14, 1976 the Commission (Division 2) affirmed and adopted the statement of facts, conclusions and findings of the Administrative Law Judge; and the railroad defendants were ordered to cease maintaining different rates eastbound from Chicago on ex-truck grain shipments than on shipments of ex-rail, ex-lake and ex-barge grain. (App. p. c-1)

The railroads defendant before the Commission filed with the Court of Appeals for the Eighth Circuit on March 13, 1976 a petition for review of the above described Commission order and sought to have said order set aside. Said petition was filed under 28 U.S.C., Sections 2321, 2341 and 2342. The Commission stayed its order *pendente lite.*

Petitioner. Anheuser-Busch, Inc., having been a party in the Commission proceeding, intervened as a petitioner-intervenor in the appeal proceeding pursuant to the order of the Court under Rule 15(d) of the Federal Rules of Appellate Procedure and 28 U.S.C. 2348. (App. p. f-1)

By decision filed February 24, 1977 the Court of Appeals, by decision of Stephenson and Henley, Circuit Judges, and Meredith, District Judge found, the assailed Commission order not contrary to law and denied petitioners' request to set aside the order of the Commission. (App. p. a-1) Petitioners' petition for rehearing was denied by the Court on March 31, 1977. (App. p. b-1)

REASONS FOR GRANTING THE WRIT

1. Conflict With Decision Of This Court.

The decision of the Eighth Circuit and the order of the Interstate Commerce Commission are clearly in conflict with the decision of this Court in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943).

In the present case the Eighth Circuit and the Commission ruled that Section 2 of the Interstate Commerce Act (49 U.S.C. Sec. 2) was violated by maintenance by the railroads of proportional or reshipping rates eastbound from Chicago on ex-rail, ex-lake and ex-barge grain while failing to apply such rates on ex-truck traffic. The ruling was based on the generally admitted fact that railroad transportation eastbound from Chicago is substantially the same on all grain traffic. (App. pp. a-3-4)

In *Inland Waterways* the railroads had denied from Chicago eastbound on ex-barge traffic the proportional or reshipping rates maintained on ex-rail and ex-lake grain despite the admission that the railroad service eastbound from Chicago was substantially the same. This Court sustained the decision of the Commission that no discrimination existed under Section 2 despite the similarity of railroad transportation service eastbound from Chicago on all involved grain. The ex-barge grain, therefore, was forced to move eastward from Chicago under the higher local rates.

In *Inland Waterways* the complaining parties before the Commission had maintained that to deny the ex-barge grain the benefit of the proportional and reshipping rates applicable eastbound from Chicago was

necessarily unlawful since the physical carriage beyond Chicago was substantially the same. (319 U.S. 683-684)

The Court noted:

> "As the Commission correctly observed with respect to the first contention, 'to adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned.' " (319 U.S. 684)

This Court went on to discuss the long history of proportional rates. It noted that proportional rates, differing from local rates, antedated the Interstate Commerce Act, and had never been condemned by Congress, the courts or the Commission. The Court then held that the maintenance of proportional rates for ex-rail and ex-lake traffic while refusing to extend them to ex-barge traffic did not violate Section 2 of the Act.

In failing to give effect to *Inland Waterways*, the Eighth Circuit and the Commission rely upon *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1949); and *James McWilliams Blue Line, Inc.* v. *United States*, 100 F. Supp. 66 (S.D.N.Y. 1951); aff'd. per curiam 342 U.S. 951 (1952). These decisions and the related Commission proceedings arose after the 1940 amendments of the Interstate Commerce Act under which through routes are maintained by the railroads with the barge lines; and under the statute, as amended, such through routes may be required. Similarly, under the 1940 amendments of the Interstate Commerce Act the barge lines are given the status of "connecting" carriers and granted specific protection against discrimination in the rates applied by the railroads. (49 U.S.C. Sec. 3(4)) With the status of

the barge lines changed and with the establishment of through routes, this Court in *Mechling* held that denial on ex-barge grain eastbound from Chicago of the proportional or reshipping rates provided on ex-rail and ex-lake grain was discriminatory and unlawful under Section 2.

The Eighth Circuit and the Commission erred in failing to recognize that *Mechling* (and the *Blue Line* case) did not overrule or modify this Court's decision in *Inland Waterways*. Properly read and applied, the decision of this Court in *Mechling* merely recognized the changed status of the barge lines and their traffic under the 1940 amendments to the Interstate Commerce Act. The amended Act contemplated, and provided for the mandatory establishment of, through routes between railroads and barge lines and the existence of through routes between the barge lines and the railroads was given recognition.

In the present case the ex-truck traffic has the same status as did ex-barge traffic prior to the 1940 amendment to the Interstate Commerce Act. The ex-truck traffic does not move on through routes and the Commission possesses no statutory authority to require that such through routes shall be established or maintained.

Inherently, and by definition, proportional or reshipping rates apply on a segment of a through route. Such through routes are the basis of proportional or reshipping rates on grain eastbound from Chicago on ex-rail, ex-lake and ex-barge traffic as to which through routes are maintained. Since no such through routes are maintained by the railroads with the truck carriers handling grain to Chicago, the essential basis for

a proportional or reshipping rate is absent on such ex-truck traffic. This fundamental distinction was erroneously disregarded by the Eighth Circuit and the Commission, the Court erroneously stating that the fact that "a through movement" exists on the preferred traffic "is beside the point." (App. p. a-10)

2. Section 2 Of The Interstate Commerce Act Is Not Violated By Maintaining Proportional Rates For Through Movements While Not Maintaining Proportional Rates For Non-Through Movements.

As stated above, the inherent basis of proportional and reshipping rates is that such rates apply for a segment of a through movement over a through route. The ex-truck grain shipments from Chicago eastbound do not move over such through routes and are, therefore, not to be given proportional rates as are shipments which are moving over through routes in which the segment from Chicago eastbound is but a part of the total route. The courts have uniformly held that a through rate from origin to destination may be lower than the sum of local rates for segments making up the through route without creating an unjust discrimination. *United States* v. *Great N. Ry.*, 343 U.S. 562, 566, N. 2 (1951); *Parsons* v. *Chicago N.W. Ry.*, 167 U.S. 447 (1896); *I.C.C.* v. *Baltimore & O.R.R.*, 145 U.S. 263 (1892).

Section 2 of the Act states that carriers may not charge different amounts to different shippers for "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions . . ." Section 2 of the Act has never been construed as prohibiting carriers from charging a greater amount to a shipper who ships over

a *non-through route* on local rates than to a shipper who ships over a *through route* on a through rate. Accordingly, applying proportional or reshipping rates, which are the balance of the through rate, to the outbound portion of a through movement without also applying them to local or non-through movements is not a violation of Section 2.

Mechling, which is the basis for the decision below, in no way altered the holding in *Inland Waterways.* In *Mechling,* the railroads had established through routes with barge carriers. The proportional rates from Chicago to the East, however, were somewhat higher for ex-barge grain than for ex-rail. The Court held it to be a violation of Section 2 of the Act to charge ex-barge grain higher proportional rates than were applied on ex-rail traffic. As noted, *Mechling* differed from *Inland Waterways* in the significant respect that through routes existed in the *Mechling* case whereas none existed in the *Inland Waterways* case.

With Section 2 of the Interstate Commerce Act interpreted and applied for almost a century as not condemning proportional or reshipping rates (lower than local rates) as unlawfully discriminatory under Section 2 of the Interstate Commerce Act, it is wholly untenable for the Eighth Circuit and the Commission to have held that uniform rates are required eastbound from Chicago without regard to whether the traffic is local in character from Chicago or is moving on through routes to and from Chicago.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR L. WINN, JR.
SAMUEL H. MOERMAN
PAUL M. DONOVAN
743 Investment Building
Washington, D. C. 20005
(202) 628-2788
Attorneys for Petitioner

June 9, 1977